

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES E. DANIELS
Claimant

VS.

AMERICOLD CORPORATION
Respondent

AND

**TIG PREMIER INSURANCE COMPANY
and TRAVELERS INSURANCE CO. -
CASUALTY DEPARTMENT**
Insurance Carriers

Docket No. 189,238

ORDER

STATEMENT OF THE CASE

Claimant requested review of the May 8, 2007, Post Award Decision entered by Administrative Law Judge Robert H. Foerschler. Donald T. Taylor, of Kansas City, Kansas, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for respondent and its insurance carrier, TIG Premier Insurance Company (TIG). Theresa A. Otto, of Kansas City, Missouri, appeared for respondent and its insurance carrier, Travelers Insurance Company - Casualty Department (Travelers).

In this post-award action in which the claimant requested payment of post-award medical, civil penalties, and post-award attorney fees, the Administrative Law Judge (ALJ) found that the

obligation of the employer/carrier is limited by the Kansas system of restricting medical expenses to reasonably [sic] as determined from time to time by our statistics, particularly those applying to post award medical care. (See K.S.A. 44-510j&k). This is now out of the hands of Administrative Law Judges.¹

¹ ALJ Post Award Decision (May 8, 2007) at 2.

The ALJ likewise did not rule on the issue of civil penalties. Nevertheless, the ALJ awarded claimant's attorney \$975 for attorney fees, stating that this sum included two hours for the April 19, 2007, hearing and that the fees were being awarded at the rate of \$120 per hour. He said "[t]he rest, if further disputes occur, should all be referred to the Director."²

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 19, 2007, Motion for Penalties Hearing, together with transcripts of all previous hearings and depositions admitted into evidence in this case and the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that the issue of post-award medical is out of the hands of the administrative law judge. Claimant also contends the ALJ erred in finding that claimant should refer his request for post-award attorney fees to the Director. Claimant argues that his attorney is entitled to all his requested attorney fees for work involving post-award medical care and treatment and his efforts to obtain payment of the expenses of post-award medical care, treatment and prescriptions. Finally, claimant asserts the ALJ should have issued an award of civil penalties against respondent for failing to timely pay post-award medical expenses incurred by claimant.

Respondent/TIG contends that claimant provided no evidence to satisfy the elements of K.S.A. 44-512a, including no evidence that the ALJ ordered the payment of the bills in dispute and no evidence of the demand required by the statute before penalties are assessed. Respondent also argues that the ALJ did not abdicate his rulings to the Director or the Board. In regard to attorney fees, respondent asserts the only itemized billing properly in the record shows 4.75 hours of legal work and that the award of attorney fees was in accord with K.S.A. 44-536. Accordingly, respondent/TIG requests the Board affirm the ALJ's Post Award Decision.

The issues for the Board's review are:

- (1) Did the ALJ err in finding that the issue of post-award medical is out of the hands of administrative law judges?
- (2) Did the ALJ err in referring claimant's request for post-award attorney fees to the Director?
- (3) What is a reasonable attorney fee for claimant's attorney?

² *Id.*

(4) Did the ALJ err by not awarding civil penalties against respondent for the untimely payment of the \$12,062.27 bill from the Kansas University Medical Center (KUMC) and for nonpayment of the medical expenses in the amount of \$2,592 for claimant's medical treatment in October and November 2006?

FINDINGS OF FACT

The claimant in this post-award action was originally injured sometime between December 29, 1991, and December 18, 1993.³ As a result of those injuries, the ALJ, in his Award filed October 30, 1995, found claimant was permanently totally disabled. Future medical treatment was ordered upon proper application and hearing. Between 1995 and the present, numerous demands were made upon respondent and its insurance carriers for payment of claimant's post-award medical expenses. Claimant's post-award medical treatment included a kidney transplant in 1996. One of respondent's insurance carriers, Travelers, has purportedly paid its limits of coverage pursuant to its insurance contract with respondent, and respondent's excess carrier, TIG, has taken over responsibility for claimant's post-award medical expenses.

In August 2005, claimant suffered acute renal failure, hypotension, and fever. He was admitted to KUMC. KUMC's bill for claimant's treatment for this hospitalization was in the amount of \$12,062.27. It was apparently originally tendered to respondent/TIG by fax from claimant's attorney on May 8, 2006. On June 20, 2006, claimant's attorney wrote a letter to the attorney for respondent/TIG requesting payment of the bill from KUMC. On September 20, 2006, claimant filed a Demand for Compensation, Application for Civil Penalties and Motion to Strike Medical Report.

Respondent/TIG had the KUMC bill reviewed by Dr. Jeremiah Twomey of Houston, Texas. According to respondent/TIG, Dr. Twomey came to the conclusion that the treatment received at KUMC was not related to claimant's injury. At the hearing on claimant's motion held October 23, 2006, respondent/TIG argued that the hospitalization at KUMC did not arise out of claimant's work-related injury. Respondent/TIG offered Dr. Twomey's report as an exhibit to the ALJ. The ALJ concluded that Dr. Twomey's deposition needed to be taken and ordered respondent/TIG to advance reasonable travel expenses for claimant's attorney to travel to Texas for the deposition.⁴ The deposition was scheduled for December 4, 2006, but shortly before that date, respondent/TIG apparently decided to pay the KUMC bill and cancelled the deposition. That bill was apparently paid in February 2007.

On February 5, 2007, claimant filed a Demand for Compensation and Application for Civil Penalties and Attorney Fees requesting that the ALJ order respondent to pay post-

³ ALJ Award (Oct. 30, 1995) at 2.

⁴ ALJ Preliminary Decision (Oct. 31, 2006) at 2.

award medical expenses in the amount of \$2,592 covering the period of October and November 2006. Attached to the Demand were copies of fax cover sheets dated December 1, 2006, December 20, 2006, and December 27, 2006, that claimant's attorney sent to the attorney for respondent/TIG requesting payment of the bills. At the motion hearing held April 19, 2007, claimant's attorney stated that bills from August 12, 2005, in the amount of \$1,160; from October 4, 2006, in the amount of \$1,358; and from November 7, 2006, in the amount of \$1,234 remained unpaid. Claimant's attorney also announced that he had received three additional bills that had not been submitted to respondent/TIG. Respondent/TIG admitted receiving the first three outstanding bills but stated that no itemized bills had been provided as required by K.A.R. 51-9-10. Counsel for respondent/TIG stated that when itemized bills were submitted, he suspected that the bills would be processed and paid. Counsel for respondent/TIG also stated that he had not seen the three additional bills that claimant's attorney mentioned.

In regard to the collection notices claimant was getting demanding payment of the medical bills, the ALJ stated:

The guys that do the collecting don't know very much about itemized bills either. They just know somebody tells them they haven't been paid, what they think they have coming. So I can agree with you, it's a real involved process, but there really isn't a whole lot I can do about it. I don't have authority to go off and order people to do this and that and the other thing.⁵

At the April 19, 2007, hearing, claimant also argued that he had submitted medical mileage to respondent/TIG for reimbursement that had not been paid. He submitted an update of his request for medical mileage on April 19, 2007, the date of the motion hearing, and said he was optimistic that the medical mileage issue would be resolved.

Although in his Demand filed February 5, 2007, claimant had specifically requested civil penalties for nonpayment of the two bills totaling \$2,592 and the late payment of the KUMC bill in the amount of \$12,062.27, at the hearing on April 19, 2007, he made no argument concerning penalties. Respondent/TIG argued that all itemized bills received had been paid and the only bills remaining unpaid were those that were not itemized. Respondent/TIG argued that penalties "shouldn't lie in this situation because those bills have never been properly presented under the administrative regulation in a form in which they can be processed and paid."⁶

Although Judge Foerschler begins his May 8, 2007, Post Award Decision with a description of the proceeding as a "motion for penalties," his order is otherwise silent as to that issue.

⁵ Motion for Penalties Hearing (Apr. 19, 2007) at 15.

⁶ Motion for Penalties Hearing (Apr. 19, 2007) at 10.

In his Demand, claimant also requested payment of his post-award attorney fees for the period from September 26, 2005, through December 20, 2006, attaching a copy of his time sheet. That time sheet covered a period from September 26, 2005, through December 20, 2006, for 40.25 hours of work. At the hearing, claimant's attorney submitted a handwritten supplemental time sheet covering a period from February 1, 2007, through April 17, 2007, listing an additional 4.75 hours. Respondent/TIG did not dispute that claimant's attorney was entitled to attorney fees but argued that some times listed on the sheet were disproportional to the time that should be allowed for the activity. Respondent/TIG also argued that it should not be required to pay attorney fees for claimant's attorney's efforts to prosecute it under the fraud and abuse statute. Claimant argued that he felt the letters to the Fraud and Abuse Section of the Division and to the Insurance Commissioner were necessary to effect payment of the medical bills.

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-510k states:

(a) At any time after the entry of an award for compensation, the employee may make application for a hearing, in such form as the director may require for the furnishing of medical treatment. Such post-award hearing shall be held by the assigned administrative law judge, in any county designated by the administrative law judge, and the judge shall conduct the hearing as provided in K.S.A. 44-523 and amendments thereto. The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award. No post-award benefits shall be ordered without giving all parties to the award the opportunity to present evidence, including taking testimony on any disputed matters. A finding with regard to a disputed issue shall be subject to a full review by the board under subsection (b) of K.S.A. 44-551 and amendments thereto. Any action of the board pursuant to post-award orders shall be subject to review under K.S.A. 44-556 and amendments thereto.

(b) Any application for hearing made pursuant to this section shall receive priority setting by the administrative law judge, only superseded by preliminary hearings pursuant to K.S.A. 44-534a and amendments thereto. The parties shall meet and confer prior to the hearing pursuant to this section, but a prehearing settlement conference shall not be necessary. The administrative law judge shall have authority to award medical treatment relating back to the entry of the underlying award, but in no event shall such medical treatment relate back more than six months following [sic] the filing of such application for post-award medical treatment. Reviews taken under this section shall receive priority settings before the board, only superseded by reviews for preliminary hearings. A decision shall be rendered by the board within 30 days from the time the review hereunder is submitted.

(c) The administrative law judge may award attorney fees and costs on the claimant's behalf consistent with subsection (g) of K.S.A. 44-536 and amendments thereto. As used in this subsection, "costs" include, but are not limited to, witness fees, mileage allowances, any costs associated with reproduction of documents that become a part of the hearing record, the expense of making a record of the hearing and such other charges as are by statute authorized to be taxed as costs.

K.S.A. 44-512a states in part:

(a) In the event any compensation, including medical compensation, which has been awarded under the workers compensation act, is not paid when due to the person, firm or corporation entitled thereto, the employee shall be entitled to a civil penalty, to be set by the administrative law judge and assessed against the employer or insurance carrier liable for such compensation . . . in an amount for each past due medical bill equal to the larger of either the sum of \$25 or the sum equal to 10% of the amount which is past due on the medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within 20 days from the date of service of such demand.

K.A.R. 51-9-10 states in part:

(a) Upon the completion of treatment in all compensation cases, physicians shall promptly notify the employer or carrier, and shall render their final bills forthwith. Bills for medical care providers and hospitals shall be itemized showing the date and the charge for services rendered.

K.S.A. 44-510j states in part:

When an employer's insurance carrier or a self-insured employer disputes all or a portion of a bill for services rendered for the care and treatment of an employee under this act, the following procedures apply:

(a)(1) The employer or carrier shall notify the service provider within 30 days of receipt of the bill of the specific reason for refusing payment or adjusting the bill. Such notice shall inform the service provider that additional information may be submitted with the bill and reconsideration of the bill may be requested. The provider shall send any request for reconsideration within 30 days of receiving written notice of the bill dispute. If the employer or carrier continues to dispute all or a portion of the bill after receiving additional information from the provider, the employer, carrier or provider may apply for an informal hearing before the director.

K.S.A. 2006 Supp. 510i(b) states in part:

(b) The medical administrator, subject to the direction of the director, shall have the duty of overseeing the providing of health care services to employees in accordance with the provisions of the workers compensation act, including but not limited to:

(1) Preparing, with the assistance of the advisory panel, the fee schedule for health care services as set forth in this section;

(2) developing, with the assistance of the advisory panel, the utilization review program for health care services as set forth in this section;

K.S.A. 44-525(a) states:

Every finding or award of compensation shall be in writing signed and acknowledged by the administrative law judge and shall specify the amount due and unpaid by the employer to the employee up to the date of the award, if any, and the amount of the payments thereafter to be paid by the employer to the employee, if any, and the length of time such payment shall continue. The award of the administrative law judge shall be effective the day following the date noted in the award.

K.S.A. 44-551(i)(1) states in part:

Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

K.S.A. 2006 Supp. 44-555c(a) states in part:

The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS AND CONCLUSION

1. Issues concerning post-award medical treatment are not “out of the hands of Administrative Law Judges.”⁷ The Kansas Workers Compensation Act does have a medical fee schedule. K.S.A. 44-510j provides a procedure for determining disputes

⁷ ALJ Post Award Decision (May 8, 2007) at 2.

concerning the amount of medical fees. Nevertheless, the determination of whether treatment is reasonable and “necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award” remains within the jurisdiction of the ALJ.⁸ In this case, the ALJ must decide whether the medical bills in dispute were previously ordered paid and if they were not, then the ALJ must decide if they should be ordered paid by respondent.⁹ The Board’s jurisdiction is to review orders and determinations made by an ALJ. As the ALJ failed to make a determination of whether the bills had been or should be ordered paid as reasonable and related medical treatment expenses, this issue must be remanded to the ALJ for this determination.

(2) and (3) The ALJ obviously intended to address claimant’s full request for attorney fees when he said they were being approved and ordered paid “all at \$120.00 an hour.”¹⁰ However, not all of the time expended by claimant’s attorney was accounted for. In addition, consideration should be given to claimant’s attorney’s time in handling this appeal, as well as the time that will be expended on remand. Accordingly, the issue of attorney fees will be remanded to the ALJ for consideration of the entire record. The Board does not know what Judge Foerschler meant by “The rest, if further disputes occur, should all be referred to the Director.”¹¹

(4) The ALJ failed to address the claimant’s request for penalties. Therefore, that issue will be remanded to the ALJ for a determination.¹² Respondent acknowledges that certain medical bills remain unpaid. But respondent contends it cannot be penalized for this because claimant has not provided respondent with a billing in the appropriate form. The statute, however, does not place this burden upon the claimant. Rather, K.S.A. 44-510j makes it respondent’s burden to notify the service provider of any dispute within 30 days of its receipt of a bill. Furthermore, respondent must state the specific reason for refusing payment or for adjusting the bill. Therefore, if respondent requires a billing in a different form, it is respondent’s responsibility to obtain it from the medical provider, not claimant’s. And neither K.S.A. 44-510j nor K.S.A. 44-512a provide for a stay of the imposition of penalties while respondent is pursuing such information.¹³ As such, payment

⁸ K.S.A. 2006 Supp. 44-510k(a).

⁹ Once the bill is received, respondent cannot delay making payment beyond the 30 days allowed for giving notice to the provider of any dispute unless the employer or carrier has notified “the service provider within 30 days of receipt of the bill of the specific reason for refusing payment” K.S.A. 44-510j(a)(1).

¹⁰ ALJ Post Award Decision (May 8, 2007) at 2.

¹¹ *Id.*

¹² This appeal is reminiscent of the appeal from Juge Foerschler’s June 15, 2004, Post Award Decision, which the Board likewise remanded for a determination of the issues of penalties and attorney fees. See *Daniels v. Americold Corporation*, No. 189,238, 2004 WL 2522307 (WCAB Oct. 29, 2004).

¹³ *Palmer v. DCCCA*, No. 248,202, 2003 WL 1918540 (Kan. WCAB Mar. 4, 2003).

is required.¹⁴ Nevertheless, before a civil penalty can be imposed, claimant must show that he has satisfied the requirements of K.S.A. 44-512a. These requirements include an order from the ALJ that the medical treatment expenses be paid by respondent and service of a demand by claimant upon respondent that specifies the bills that are unpaid and past due. The ALJ has not made a determination of these issues.¹⁵

ORDER

WHEREFORE, it is the finding, decision and order of the Board that the Post Award Decision of Administrative Law Judge Robert H. Foerschler dated May 8, 2007, is reversed and remanded to the ALJ for further orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of August, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Donald T. Taylor, Attorney for Claimant
Kip A. Kubin, Attorney for Respondent and TIG Insurance Co.
Theresa A. Otto, Attorney for Respondent and Travelers Insurance Co.
Robert H. Foerschler, Administrative Law Judge

¹⁴ Respondent's recourse is to obtain reimbursement for any overpayment from the provider.

¹⁵ It is also unclear from this record whether the bills in question are all from authorized medical providers, although they most likely are as respondent has not alleged any to be unauthorized.